

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2110

To Be Argued by
ARTHUR LITMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES, Petitioner, MARTHA CARMONA, ROSA
POGGE, and all other persons similarly
situated,

Petitioner-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York
State Department of Correctional Services;
FRANCIS W. BENTLEY, Superintendent, Bedford
Hills Correctional Facility, Bedford Hills,
New York; and all other persons similarly
situated; FRANK FILDWELL, Acting Chairman
of the New York State Board of Parole; and
the NEW YORK STATE BOARD OF PAROLE,

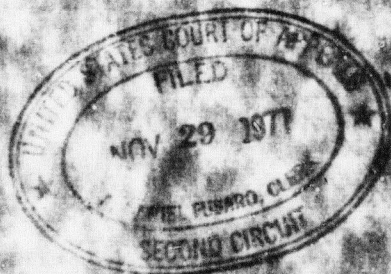
Respondents-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK

BRIEF FOR INTERVENOR-PETITIONER-APPELLEE

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INTRODUCTORY STATEMENT

This brief is submitted on behalf of Roberta Fowler, intervenor in the court below. The issues presented for review and the statement of proceedings and of facts are adequately set forth in the brief of appellants, as modified by the brief of appellees Carmona and Foggie. This brief is submitted to present in detail the provisions of the 1973 New York Drug Law Amendments in relationship to the Fourteenth Amendment to the United States Constitution. Appellee Fowler expressly adopts and joins with all claims advanced on behalf of the other appellees. Those arguments are not repeated at length here in the interests of economy and brevity.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment is applicable to criminal sentencing statutes. Although the precise parameters of judicial review are unsettled, this Court should conclude that there is no rational relationship between the actual announced purposes of the 1973 drug law and its provisions for life imprisonment or

parole for the sale of minimal quantities of cocaine or heroin, and that this failure renders the statutory scheme unconstitutional under the Fourteenth Amendment.

ARGUMENT

The Equal Protection Standard Applicable In This Case

Statutes which classify persons for treatment or punishment on the basis of criminal conduct are subject to scrutiny under the equal protection clause. Skinner v. Oklahoma, 316 U.S. 535 (1942); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972). What is less clear is the precise nature of the equal protection standard to be applied to such sentencing schemes.

Certain classifications must be given strict scrutiny under the equal protection clause and may be upheld only if supported by a compelling state interest. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). The classifications which give rise to this test are those which are inherently suspect, i.e. race, national origin and alienage, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); and those which infringe in a discriminatory manner on fundamental individual interests and rights,

e.g., the right to travel, the right to vote, and the right to procreate, Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 667 (1966); Griswold v. Connecticut, 381 U.S. 497 (1965). Traditionally, classifications not falling into either of these groups were subjected only to a minimal scrutiny test which upheld the classification if it was rationally related to any conceivable purpose the legislature might have had in creating it. McGowan v. Maryland, 266 U.S. 420 (1961); Williams v. Lee Optical, 348 U.S. 483 (1955). Recent decisions have evolved a more complex principle of review in Equal Protection cases, which entails an evaluation of the statutory classification in light of the actual legislative purpose in creating this classification. Such an inquiry was conducted in Craig v. Boren, U.S. , 97 S.Ct. 451 (1976); and in McGinnis v. Royster, 410 U.S. 263 (1973). See generally, Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1 (1972). Other commentators have viewed the recent cases as evidencing stricter review of classifications which infringe upon significant individual interests, or those which, while not inherently suspect, are subject to a high risk of abuse. See Bice, Standards for Judicial Review Under the Equal Protection and Due Process Clauses, 50 So. Cal. L. Rev. 689 (1977); Perry, Con-

stitutional Fairness, 63 Va. L. Rev. 383 (1977). The California Supreme Court has held that the right to be free of incarceration and parole is fundamental enough to invoke the strict scrutiny standard under the state's equal protection clause. People v. Oliver, 551 P.2d 375, 31 Cal. Rptr. 55 (1976).

Whether the analytical approach departs from closer scrutiny of the legislative purpose, or from more protective evaluation of the rights infringed, the destination is the same; within a range of legislative discretion, a statute which carries the threat of life imprisonment must be rationally designed to achieve the actual purposes of the legislature. Accordingly, we will proceed to review the actual legislative purposes, the chosen means, and the telic relationship between the two.

The Actual Purposes of
the 1973 Drug Laws

The complex process of analysis in non-race equal protection cases, involving a comparative assessment of individual rights, legislative purpose, logical bases of the chosen means, and relationship between means and ends, requires the Court to conduct an independent empirical inquiry of significant scope. See Tussman & ten Broek, 37 Cal. L. Rev. at 367-68.

In evaluating the legislative purpose, the trial court entertained evidence from the legislative history of the amendments, including the Governor's Message to the 1973 Legislature, the reports of the Temporary Commission to Evaluate the Drug Laws, and legislative hearing records.*

The 1973 Drug Law Amendments do not contain a specific statement of legislative purpose. There are several purposes which have been specifically set forth in various documents comprising the legislative history described above, or which may logically be inferred from the circumstances surrounding the law's enactment. The Court may ascertain the actual legislative purposes from the empirical evidence available.** The actual purposes here

* McKinney's Session Laws 2317-2320 (1973).

The Temporary Commission to Evaluate the Drug Laws was in existence from 1970-1971 under authority of Ch. 474 Laws of 1970. During that time it produced several reports, including Drugs and Drug Penalties Under Review, N.Y. State Legislative Document No. 13 (1973); How People Overseas Deal With Drugs, N.Y. State Legislative Document No. 10 (1972).

Legislative hearings were held by the Codes Committees of the Senate and Assembly during January and February 1973. Floor debates on Bills S-6204 and S-6205, A-7328 and A-7873, have been transcribed.

** The New York Court of Appeals apparently considered both actual and possible legislature purposes. People v. Broadie, 37 N.Y.2d 100, 113-114, 371 N.Y.S.2d 471, 476, 477 (1975). See Green v. Waterford Bd. of Education, 473 F.2d 629 (2d Cir. 1973).

include:

1. To differentiate between those who possess and/or sell small quantities of heroin or cocaine for individual use or to produce income to support an addiction, and to punish most severely those large scale drug distributors who are responsible for import, manufacture, and distribution of cocaine and heroin, and the corruption of government enforcement officials. Report of the Temporary Commission to Evaluate the Drug Laws, N.Y. State Legislative Document No. 13 (1973) at 248.

2. To reduce violent crime collaterally associated with the sale and use of heroin and cocaine. See, e.g., Governor Rockefeller's Message to the Legislature, McKinney's Session Laws 2318 (1973).

3. To isolate from society those who engage in the sale of heroin and cocaine.

4. To deter those who might engage in the sale of heroin or cocaine by imposing extremely harsh penalties on those convicted of such offenses.

5. To reduce the frustration of enforcement officials, police, prosecutors and the public, by reducing court congestion which compels the negotiation of pleas to offenses carrying light sentences.

The Means: Discretionary Life Sentence

The term "mandatory life sentence" is a misnomer, held over from the original proposal submitted by Governor Rockefeller.* The 1973 drug law authorizes the board of parole to imprison any A felony drug offender for life, but does not require such imprisonment. Thus, the law restricts the discretion of the prosecutor by limiting plea bargaining and limits the discretion of the judge to setting the minimum term within ranges,** while it extends extremely broad discretion to correctional authorities as to the actual period of imprisonment, within a range that may include from one year to life. This range has traditionally been justified in the context of rehabilitation of sexual deviates or mentally defective chronic offenders.***

* Message of Governor Rockefeller to the Legislature. McKinney's Sessions Laws 2318 (1973). See S-1365, A-1556. The original bill, which was subsequently modified during hearings, called for actual life prison terms.

** The court must impose a maximum life term for any A drug felony. Penal Law §70.00. The ranges for minimum terms are 1 to 8 years 4 months for an A-III felony, 6 to 8 years 4 months for an A-II felony, and 15-25 years for an A-I felony.

*** Indeterminate sentences authorizing confinement for longer than the maximum term of the underlying offense uniformly have been held to require treatment of the offender. See, e.g., Sas v. Maryland, 354 F.2d 506 (4th Cir. 1964).

The effect of the statute is to vest extremely broad discretionary authority in an administrative agency. There are no provisions for specific standards, public scrutiny, or meaningful review of the decisions. It is anticipated that actual incarceration for the maximum period will be imposed only upon a relatively small number of A drug felons, although a revocation of parole may lead to restoration of the lifetime sentence. Thus, the statute has a potential for arbitrary and discriminatory enforcement, directed at unpopular minorities. The statute thus has two aspects which raise constitutional problems: as a life sentence, it is unusually harsh; and as a discretionary sentence, it is subject to arbitrary enforcement.

In reviewing the constitutionality of a criminal sentencing statute, the court must consider first the maximum term of imprisonment imposed. In re Lynch, 8 Cal. 3d 410, 503 P.2d 921 (1972). A factor to be considered is the numerical impact of the law. In Trop v. Dulles, 356 U.S. 86 (1957), the court found it significant that some 21,000 persons had committed the offense of desertion during World War II. The potential of the drug law amendments is vast. The problem of narcotic use and addiction is severe. There are at least 300,000 heroin addicts in New York City

alone,* and approximately as many persons who use cocaine. Many of these persons are less than twenty-five years old.** Virtually anyone who has any contact with cocaine or heroin is a seller under the New York statute.***

Not only is the effect of the 1973 drug law amendments vast, it is also severe. When considered in the context of all other penal sanctions, the maximum life sentence is fundamentally irrational. The effect of the law is to single out certain drug offenders for harsher punishment than such traditionally reviled criminals as those who commit voluntary manslaughter, forcible rape, sodomy upon children less than eleven years old, burglary causing

* United States Bureau of Narcotics and Dangerous Drugs (1972), reported in HAFEN, Drug Abuse 423 (1973). It is estimated by the same source that five to six tons of heroin are needed annually to supply this addict population.

** Information regarding the temporal frequency of the use of [cocaine] by . . . abusers is completely anecdotal; that is, we know of no studies in which the amount and frequency of cocaine self-administration by people have been examined. We may safely assume that the use of cocaine by individuals is probably spread over a wide range of frequencies.

Woods, et al., The Psychopharmacology of Cocaine, in Drug Abuse in America: Problem in Perspective, The Second Report of the National Commission on Marijuana and Drug Abuse, at 116 (1973). However, the same authority reports that up to 85% of regular heroin users also use cocaine.

*** New York P.L. §220.00(1) defines sale to include any exchange, including a gift or promise.

physical injury, setting fire to an occupied building, grand larceny by extortion, and possession of a machine gun with intent to use unlawfully.* All these offenses are Class B felonies or lower. Grade B felonies carry a maximum term of twenty-five years, and no minimum sentence is required. Penal Law §70.00.

This extremely harsh penalty bears no rational relationship to the purposes of the law. Neither retribution nor rehabilitation is a legislative purpose of the drug law provisions. Penal Law §1.05; Message of Governor Rockefeller to the Legislature, McKinney's Session Laws 2318 (1973). Justification for such unusually harsh treatment must be assessed in terms of the utility of the law in isolating offenders or deterring actual or potential offenders.

The isolation purpose is achieved by a statutory classification which is both over-inclusive and under-inclusive. Detention of the convict to prevent him or her from committing another crime during the period that the person would, if at liberty, actually commit such a crime is the premise supporting isolation. The detention is rational only to the extent that the premise is true.

* P.L. §§125.20, 130.35, 130.50(3), 140.30, 150.15, 155.40, 265.03.

There is no empirical data, nor any evidence in the legislative history, to indicate that drug offenders are more likely to be recidivists than burglars, sex criminals or arsonists. There is not even any reason to suppose this to be true. Even if there were some indication of a greater likelihood of recidivism among drug offenders, preventive isolation involves such a serious deprivation of personal liberty that it is justified only by demonstrating an extremely high probability that the prediction is accurate for a large majority of those detained. Use of severe sanctions requires both rationality and accuracy. See generally, Leary v. United States, 395 U.S. 6, 36 (1969); In re Winship, 397 U.S. 358 (1970).

There are indications that another purpose of imprisoning drug offenders for long terms is to prevent ancillary crimes. See Message of Governor, McKinney's Session Laws 2318 (1973). These ancillary crimes include robbery, assault, burglary, that it is thought would be committed by drug addicts seeking funds for drug purchases or by drug sellers and users in fighting over sales. Id. To the extent that this is the purpose of the law, the law is invalid. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Casting a broad net aimed at a "criminal element" rather than at specific conduct is impermissible.

Id.; see also Lanzetta v. New Jersey, 306 U.S. 451 (1939). Additionally, as noted in the opinion below at note 62, p. in other instances where ancillary crimes are a concern, the appropriate response is stricter enforcement of existing laws, not for increases in penalties.

The remaining legislative purpose said to be advanced by the life imprisonment is deterrence. Deterrence may be specific, that is, discouraging the individual convicted from repeating the offense, or it may be general, i.e., directed at potential law breakers. The efficacy of imprisonment as a specific deterrent is extremely low. Ironically, one of the best predictive factors of future criminal activity is a history of time in jail.* As a general deterrent, the 1973 drug law amendments have been a failure. See Report of Drug Law Evaluation Project, Joint App. p. 179. Additionally, the efficacy of criminal prohibition in dealing with alcohol and drug abuse has consistently been shown to be extremely low, if not in

* The indelible impact of this incarceration, the exposure to those whose way of life is crime, and to persons who have lost all hope and are resigned to failure leave many defendants hardened, embittered and more likely to recidivate once released, than they were before incarceration. Preventive Detention: An Empirical Analysis, supra at 310 and Table 11.

fact counterproductive.*

The 1973 drug law amendments increased the penalty for drug offenses, but delayed and impeded the certainty of conviction. The law has not achieved its purpose. It tends to erode the community's sense of justice and fair play by limiting prosecutors and judges in their consideration of mitigating factors, extenuating circumstances or evidence of rehabilitative potential in processing A felony drug offenses. The amendments represent an unwillingness to deal concretely with a problem that seriously impairs the way of life of large numbers of citizens. In short, the 1973 drug law amendments, even with their subsequent revisions, manifestly fall short of the goals enunciated by the Supreme Court:

The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting severity; its repetition is prevented, and hope is given for the reformation of the criminal.

Weems v. United States, 217 U.S. 349, 381 (1910).

* National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime 59 (1973); The Irrationality of a Law Enforcement Approach to Opiate Narcotics, 50 J. Urban L. 631 (1973) and authorities cited therein. See MUSTO, The American Disease: Origins of Narcotics Control (1973). The inherent limitations of the law in this context are considered in Hart, "The Aims of the Criminal Sanction," 71 Harv. L. & Contemp. Prob. 401 (1958).

As the District Court properly concluded in this case,

this Court cannot accept the proposition that the state's legitimate interests in both deterrence and isolation of drug offenders could not be as well served by sentences of shorter duration as are provided in other jurisdictions in this nation, including the federal system where many New York City and state drug offenders are regularly tried, convicted, and sentenced.

Joint Appendix, at 76.

The Indeterminate Sentencing
Scheme Has No Rational Relation
to a Legislative Purpose

The application of the indeterminate sentencing model to the narcotics area is particularly irrational in the present case. Indeterminate sentencing schemes originated in dealing with sex crimes, juvenile offenses and other areas where legislatures professed to provide rehabilitation and treatment for offenders, analogous to the care of the insane. See generally, Dershowitz, Indeterminate Confinement Letting the Therapy Fir the Harm, 123 U. Pa. L. Rev. 297 (1975). The courts have been wary of the potential for abuse inherent in such schemes, lest they become "merely a device for warehousing the obnoxious elements of society." Sas v. Maryland, 334 F.2d 506, 516 (4th Cir. 1964).

Whatever the worth of such indeterminate sentence schemes in the context of rehabilitation, the shocking aspect of the present legislation is that rehabilitation is not a legislative purpose. To the contrary, Governor Rockefeller in introducing the original legislation stated

We have allocated over one billion dollars . . . But . . . we have achieved very little permanent rehabilitation--and have found no cure.

Message of the Governor, McKinney's Session Laws 2318 (1973).

Thus, the evils attendant upon the indeterminate sentencing schemes, including its adverse effect upon plea bargaining, the difficulty of reviewing the sentences imposed, the higher terms served, and evidence that "indefinite sentences are one of the most painful aspects of prison life,"* cannot be justified here.

The conclusion must be that the legislative means, i.e., the imposition of broad indeterminate sentences with grave potential for discriminatory enforcement is not reasonably related to the legislative purposes. Rehabilitation is not a significant purpose. The law does not deter

* Struggle for Justice: A Report on Crime and Punishment in America, prepared for the American Friends Service Committee (1971), quoted in Dershowitz, supra, at 320.

members of the general public from engaging in drug trafficking. In singling out those who, like petitioner Fowler, have engaged in a single small scale sale of cocaine for such potentially harsh treatment, the law violates the Equal Protection Clause.

The Means: Discretionary
Lifetime Parole

Under the provisions of the 1973 drug law amendments, any person convicted of the sale of cocaine or heroin was to remain subject to parole for the rest of their lives, regardless of age at the time of conviction, prior record, nature of the offense, or evidence of rehabilitation. Correction Law §212(8). The law was subsequently amended, effective August 11, 1977 to partially eliminate the distinction between Class A drug felons and all other felons, by authorizing, but not requiring, discharge from parole after 3 years.*

The new law vests the parole authorities with broad

* Executive Law §259-j was amended to eliminate differential treatment of A drug felons. It now reads: If the board of parole is satisfied that an absolute discharge from parole or from conditional release is in the best interest of society, the board may grant such discharge prior to the expiration of the full maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years. A discharge granted under this section shall constitute a termination of the sentence with respect to which it was granted.

unfettered discretion to continue parole supervision over an individual for any period between 3 years and life. Under the old law, the broad discretion of the parole authorities was addressed to the decision to release from prison. However, the ramifications of parole release determination carries the same constitutional infirmities.

When a prisoner is released on parole,* he or she is free from prison walls, but continues to suffer serious restrictions upon his or her liberties. Jones v. Cunningham, 371 U.S. 236 (1963); Morrissey v. Brewer, 408 U.S. 471 (1972). In general, these restrictions** fall into three broad categories.

a. Restrictions which facilitate surveillance to detect any new criminal activity. These include discretionary searches of home and person; regular reporting requirements; waiver of extradition; and mandatory reporting of subsequent arrests.***

* Those aspects of the law dealing with the decision to grant parole affect the actual length of the "mandatory life" sentence and are accordingly discussed below.

** See Joint Appendix 216, for the certificate of Release on Parole, delineating some of the restrictions.

*** The Board of Parole is authorized to impose a broad range of conditions upon parole. Correction Law §§6 and 215. Regulations governing parole supervision are in 7 N.Y.C.R.R. §1.15. All prisoners are required to sign and agree to specified conditions of release before being paroled. 7 N.Y.C.R.R. §§1.12, 1.14. Violation of any condition of parole may in the discretion of (cont.)

b. Restrictions which reduce the occasions for renewed criminal activity. These include approval of change of job, residence, or marital status; curfews; partial or total abstinence from alcohol; restrictions on certain classes of employment; restrictions on association with others; and approval of driver's license.*

c. Restrictions which represent continued penal sanctions flowing from a felony conviction. These include loss of the right to vote, to hold public office, to engage in labor organizing or hold union office, to serve as a juror, and to engage in certain occupations involving public trust.**

*** (cont.) the parole board be punished by revocation of parole and return to jail. Correction Law §216, 7 N.Y.C.R.R. §1.13. These conditions include the right of the parole officer to visit the parolee at home or at work at any time, and to make searches of person and property in his discretion, without probable cause.

* 7 N.Y.C.R.R. §1.15. A parolee may not work as a bartender or otherwise traffic in alcoholic beverages. A.B.C. Law §126. He may not "be in the company of or fraternize with any person having a criminal record." He must support his dependents and assume toward them his legal and moral obligations. He must obtain permission from his parole officer before obtaining or renewing a driver's license and before owning or buying a car. Id.

** See Election Law §152(2); Judiciary Law §596(4). A parolee may not be licensed as a real estate sales person (Real Property Law §440-a) or as a guard or private investigator (Gen. Bus. L. §74(2)(f)).

These restrictions apply to all those released on parole. They are important for consideration in the instant case because violation of any one of these numerous restrictions or conditions of parole will result in return to prison with the possibility of serving out the rest of a lifetime sentence.

The Legislative Means: Plea Bargaining

The restrictions on plea bargaining frustrate the legislative scheme. The penalty scheme established by the 1973 drug law amendments sought to provide progressively harsher penalties for those selling progressively larger quantities of heroin and cocaine. This goal was carefully evaluated before being chosen. The legislative task force appointed to evaluate the New York drug law found that the distribution system for contraband heroin and cocaine in New York includes a large number of small-scale drug dealers at the "retail" level, who are either drug addicts supporting their own habits or victims of circumstances making little or no profits from sales. Interim Report of the Temporary Commission to Evaluate the Drug Laws, N.Y. State Legislative Document No. 13, 248-49 (1973). This conclusion has been reinforced by many careful and authoritative studies by criminologists and narcotics experts. Recognition of this

distribution structure provided the empirical basis for classifying sellers of cocaine and heroin according to the amount of substance involved.*

The legislature might have utilized other criteria in evaluating the social harm involved. For example, harsher penalties could have been provided for the sale of heroin or cocaine to minors [as was done with narcotic preparations - compare Penal Law §220.37(1) B Felony, with Penal Law §220.34(1) (a) C Felony], or with intent to induce addiction, or pursuant to a scheme for resale. In fact, however, the legislature determined that those who possess and sell large quantities of heroin and cocaine are more socially harmful than those who possess or sell smaller quantities. In light of this determination, the legislature chose to punish more harshly those who possess or sell larger quantities. See Interim Report of the Temporary Commission to Evaluate the Drug Laws, N.Y. State Legislative Document No. 13, 248-49 (1973).

The legislative scheme for the sale of cocaine and heroin provides the following penalties:

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- * Although Petitioner Fowler was charged with sale of a minimal quantity of cocaine, we join with petitioner Carmona in urging that an aggregate weight classification is inherently arbitrary in light of the well known practice of diluting cocaine and heroin by as much as 95% before distribution to drug users. Moreover, differentiation based upon such small quantities as one ounce is fundamentally irrational.

1. Any amount. [A-III Felony] 1 yr. to 8 yrs. 4 mos. minimum, mandatory life maximum.
2. More than 1/8 oz. (A-II Felony] 6 yrs. to 8 yrs. 4 mos. minimum, mandatory life maximum.
3. More than 1 oz. [A-I Felony] 15 yrs. to 25 yrs. minimum, mandatory life maximum.

These classifications were established ostensibly to achieve the legislative purpose of punishing more harshly those who sell larger amounts of cocaine and heroin.

The legislature also perceived as a problem, reflecting the perception of the general public, the number of cases in which individuals charged with drug offenses were permitted by overworked judges and prosecutors to plead guilty to offenses carrying less severe penalties merely to expedite the processing of cases. See McKinney's Session Laws 2318 (1973). To reduce the number of cases in which drug sellers negotiate pleas to lesser offenses carrying significantly lighter sentences, the legislature enacted specific restrictions on plea bargaining in the case of Class A felony drug offenses. Penal Law §§220.16, 220.18, 220.21, 220.39, 220.41, 220.43; Criminal Procedure Law §5.

At the time of petitioner Fowler's arrest the plea bargaining restrictions allowed those charged with A-1 drug felonies and A-II drug felonies to plead guilty to as little as an A-III felony, with the approval of the

court and the prosecutor. But those charged A-III felonies, such as petitioner Fowler, could not plead to a reduced charge.

These provisions, operating together, granted concessions to those charged with possession and sale of larger quantities of cocaine and heroin which it withheld from those charged with possession and sale of minimal quantities, and thus defeated the legislative purpose of mandating harsher treatment for those selling large amounts of cocaine or heroin.

In 1976, the legislature amended the plea bargaining restrictions as applied to those charged with A-III drug felonies. Those persons are now allowed to plead to not less than a Class C felony. This modification, while partially ameliorating the blatant departure from the legislative purpose of the 1973 amendments, are not available to Ms. Fowler, as the statute has no retroactive effect.*

* The District Court addressed the plea bargaining restrictions context of petitioner Foggie's challenge, finding that the restrictions bore a rational relation to the goal of deterring crime. Judge Motley failed to consider, however, that while the state may have a legitimate interest in restricting plea bargaining for A drug felons, that interest must be evaluated in the context of the statutory scheme which mandates harsher treatment for those who sell large quantities of heroin and cocaine than for those who sell very small amounts. The interest in restricting plea bargaining is devoid of any substantial relationship to the purpose of the statutory scheme.

The plea bargaining restrictions do not serve the actual legislative purpose of the 1973 drug law amendments. The restrictions tend, to the contrary, to frustrate the purpose of providing harsher treatment for those who sell larger quantities of heroin and cocaine. The selective plea bargaining restrictions, applicable only to Class A drug felons, discriminate against individuals who possess or sell extremely small quantities of cocaine or heroin in a manner which cannot be justified in light of the legislative purpose. Accordingly these restrictions violate the equal protection clause.

Due Process

It has become increasingly apparent that many claims couched in equal protection terms, based upon assertions that statutory classification schemes are irrational and discriminatory, may alternatively be drawn in due process language such as the case with the claims at bar, although the conceptual framework and terminology may vary in some respects, the conclusions compelled are virtually identical. Accordingly, the argument in this section is provided as a supplement to the petitioner Fowler's major analysis, in equal protection terms, and should be read in conjunction with them.

The federal courts have declared, in a variety of contexts, that certain statutory schemes create classifications so overinclusive as to result in unconstitutional "irrebuttable presumptions." Thus, in Stanley v. Illinois, 405 U.S. 645 (1972), the Court invalidated an Illinois statute that prevented fathers from ever gaining custody of their children, on the grounds that the statute created an irrebuttable presumption that all unmarried fathers are unfit to raise children. One year later the Court ruled that a state university system could not presume that a student was a non-resident, and thus subject to higher tuition charges simply because

the student had lived outside the state at some point during the preceding year. Vlandis v. Kline, 412 U.S. 441(1973).

In Department of Agriculture v. Murry, 413 U.S. 508 (1973), an amendment to the Federal Food Stamp Act provided that any household which included a member over the age of eighteen who had been claimed within the past year as a tax dependent by one not eligible for food stamps was declared ineligible for the food stamp program. The Court viewed this as an irrebuttable presumption that all households containing a tax dependent were not truly in need of food stamps, and held it a violation of due process. In concurrence, Justice Marshall wrote that where the private interests affected are significant, "a hearing must be provided to one who claims that the application of some general provision of the law aimed at certain abuses will not in fact lower the incidence of those abuses but will instead needlessly harm him." 413 U.S. at 518 (Marshall, concurring). The Court has also held that a school system's mandatory sick leave for pregnant teachers violated due process because of the presumption that every teacher beyond the fourth month of pregnancy was disabled. Cleveland Bd. of Education v. Lefleur. 413 U.S. 632(1974).

Taken together, these cases make it clear that the irrebuttable presumption doctrine is triggered by two pre-conditions.

1) The existence of an overinclusive statutory scheme; i.e., a classification comprising a class of persons larger than necessary to effect the legitimate purposes of the statute;

2) the deprivation of a hearing necessary for one to show that he or she should not be included within the statutory presumption when such hearings are generally accorded those similarly situated.

As discussed infra, the statutory scheme affecting those charged with A drug felonies and therefore automatically subject to a life imprisonment sentence or conviction is based on a legislative presumption that those engaged in drug trafficking, present a unique danger to society, and therefore must be subject to the maximum penalty provided for by law.

But that presumption is clearly inapplicable to respondent Fowler. She has been charged with one \$20 sale of cocaine. Significantly, the evidence indicates that she made no profit from said sale nor is there evidence that she regularly sold cocaine, or indeed that she ever sold it at any other time, or that she ever was

charged with a crime of violence. It is clear therefore, that she is not a major cog in the drug distribution machine. Nor is petitioner Fowler atypical, since the 1973 drug amendment requires all persons charged with selling a minimum amount of cocaine such as that sold by petitioner Fowler to be given a maximum sentence of life imprisonment, regardless of how otherwise exemplary their lives may be. Thus, because it includes people like petitioner Fowler who are clearly not major parts of the drug distribution mechanism and whose harsh punishment will not therefore materially add to the effectiveness of the law in combatting the drug problem, the mandatory life time sentence provided for by the 1973 Drug Law is substantially over-inclusive.

Furthermore, A-III Drug felons are distinguished from most other felons under New York law by the fact that they are given no opportunity to place evidence before the Court which would be relevant to reducing their maximum sentence. This fact is especially egregious in petitioner Fowler's case, since at the time she was sentenced, state law precluded her from pleading to a lesser offense, under which she would have had a statutory right to give such evidence. Thus, because the mandatory lifetime sentence is substantially overinclusive

as to petitioner, and because it denies petitioner the right to give evidence to the effect that the statutory purpose of the sentence would not be furthered by its application to her. The mandatory lifetime sentence constitutes an irrebuttable presumption in violation of the due process clause.

CONCLUSION

Although the conceptual elaboration is developing and perhaps unsettled, the basic principle which should control the decision in this case is that the actual purposes of the New York Legislature, isolation and deterrence of offenders, must be rationally served by the provisions of the New York drug laws. These purposes are not furthered by authorizing administrative officials, acting with minimal standards, to imprison and/or supervise for life those who sell miniscule quantities of cocaine or heroin. Therefore, this Court should affirm the judgment of the trial court declaring the 1973 drug law provisions unconstitutional.

November 23, 1977

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